IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

APPEAL NO.97 OF 2003
IN
NOTICE OF MOTION NO.606 OF 2001
IN
NOTICE NO.1550 OF 1999
IN
EXECUTION APPLICATION NO.387 OF 1999
IN
SUIT NO.3037 OF 1991

WITH

NOTICE OF MOTION NO.1733 OF 2003
IN
APPEAL NO.97 OF 2003
IN
NOTICE OF MOTION NO.606 OF 2001
IN
NOTICE NO.1550 OF 1999
(UNDER ORDER XXI RULE 22 OF CPC)
IN
EXECUTION APPLICATION NO.387 OF 1999
IN
SUIT NO.3037 OF 1991

1. The Principal Collector of Customs, having his office at New Customs House, Bombay.

2. The Union of India, (Through the Secretary, Ministry of Transport, New Delhi.

.. Appellants (Org.Defts 2 & 3)

Versus

1. M/s.Capital Colour Lab.Pvt.Ltd., Registered Company at Delhi and having its Branch Office at 21, T.V.Industrial Estate, Behind Glaxo, Worli,

Bombay - 400 025.)

2. The Board of Trustees of the)
Port of Bombay, A body)
Corporate constituted under)
the provisions of Major)
Port Trusts Act, 1963 and)
having their Office at)
Vijay Deep, Shurji Vallabhdas)
Marg, Ballard Estate,)
Bombay - 400 038.).. Respondents
(Org.plff. &
Deft.No.1)

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S/Shri B.A.Desai, Additional Solicitor General with Amjad Sayed, AGP i/b Dr.T.C.Kaushik, advocate, for the appellants.

Shri Vivek Kantawala, advocate i/b M/s.Vivek Kantawala & Co. for Respondent No.1.

S/Shri F.Dubhash with N.H.Munjee, advocates i/b Mulla & Mulla & Craigie Blunt and Caroe for Respondent No.2.

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AND

APPEAL NO.585 OF 2003
IN
SUIT NO.3037 OF 1991

1. The Principal Collector)
of Customs, having his)
office at New Customs House,)
Bombay.)

2. Union of India,)
through Secretary,)
Ministry of Transport,)
New Delhi.).. Appellants
(Org.Defts 2 & 3)

Vs.

1. M/s.Capital Colour Lab.Pvt.Ltd.,)
Registered Company at Delhi)

and having its Branch Office)
at 21, T.V.Industrial Estate,)
Behind Glaxo, Worli,)
Bombay - 400 025.)

2. The Board of Trustees of the)
Port of Bombay,)
a body Corporate constituted)
under the provisions of the)
Major Port Trusts Act, 1963)
and having their Office at)
Vijay Deep, Shurji Vallabhdas).. Respondents
Marg, Ballard Estate,) (Org.Plff. &
Bombay - 400 038.) Deft.No.1)

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S/Shri B.A.Desai, Additional Solicitor General with Amjad Sayed, AGP i/b Dr.T.C.Kaushik, advocate, for the appellants.

Shri Vivek Kantawala, advocate i/b M/s.Vivek Kantawala & Co. for Respondent No.1.

S/Shri F.Dubhash with N.H.Munjee, advocates i/b Mulla & Mulla & Craigie Blunt and Caroe for Respondent No.2.

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CORAM : R.M.S.KHANDEPARKAR &
DR.D.Y.CHANDRACHUD, JJ

DATED : 13TH JUNE, 2007

JUDGMENT: (Per R.M.S.KHANDEPARKAR, J)

1. Heard. By consent, taken up for final disposal.

2. Since common question of law and facts arise in the above appeals and the notice of motion, they were heard together and are being disposed of by this

common order.

3. All these matters originate from the order dated 21st March, 1997 passed in Suit No.3037 of 1991 by the Learned Single Judge purportedly exercising the powers under Order 8 Rule 5 and/or 10 of the Code of Civil Procedure, 1908 while disposing the suit.

4. In the year 1988, the respondent No.1 sought to import from U.S. and Japan Photographic Machineries under Tariff Item No.98.01 of Customs Tariff Act, 1975 and to have the items assessed under the "Project Import Scheme" and claimed concessional rate of duty on the said goods. In 1990, the Principal Collector of Customs denied clearance of the goods under the said Tariff Item on the ground that the same did not fall under the said item. The respondent No.1 therefore filed a Writ Petition No.1314 of 1990. Interim order came to be passed in the said writ petition directing the goods to be cleared subject to the Respondent No.1 fulfilling the conditions mentioned in the order. The respondent No.1 however failed to comply with those conditions under a letter dated 8th August, 1990 addressed by the respondent No.2 to the respondent No.1, and it was informed that the said goods should be cleared within

10 days, otherwise the same would be sold under the provisions of Sections 61 and 62 of the Major Port Trusts Act, 1963 on 20th August, 1990. A letter was addressed by the respondent No.1 to the respondent No.2 on 3rd September, 1990 informing that the procedure for clearance of the goods would be completed shortly. The respondent No.2 informed the respondent No.1 under letter dated 14th September, 1990 that the sale was postponed to 17th September, 1990. Ultimately, on 11th December, 1990, the goods were sold by public auction by the respondent No.2. The respondent No.1 filed the suit on 18th September, 1991 claiming a sum of Rs.38,24,827/- with interest from the appellants and the respondent No.2. Meanwhile, Writ Petition no.1314 of 1990 was dismissed on 2nd April, 1992. An ex parte decree came to be passed in the said suit on 21st March, 1997. An ex parte order dated 18th November, 2000 came to be passed in Notice No.1550 of 1999 in Execution Application No.387 of 1999 in the said suit No.3037 of 1991 filed by the respondent No.1 against the appellants and the respondent No.2. In 2001, Notice of Motion No.606 of 2001 came to be taken out by the appellants for setting aside the ex parte decree dated 21st March, 1997 as well as the ex parte order 18th November, 2000 in the execution proceedings. By an

order dated 25th October, 2002, the Learned Single Judge refused to set aside the ex parte decree dated 21st March, 1997 holding that the ex parte order is appealable and no notice of motion is maintainable to set aside the said order. The appellants thereupon filed the above appeals, one against the order passed by the Learned Single Judge dismissing the notice of motion and another against the original ex parte decree in the suit. Since there was a delay in filing the appeal against the ex parte decree, Notice of Motion No.625 of 2003 was taken out for condonation of delay in filing the said Appeal No.585 of 2003, and the same was allowed and the delay was condoned by order dated 30th June, 2003.

5. As regards the Appeal No.585 of 2003, the same is against the decree passed on 21st March, 1997. The decree is purportedly passed in exercise of the powers under Order 8 Rule 5 and/or 10 of the Code of Civil Procedure.

6. Order 8 Rule 5(1) of the Code of Civil Procedure provides that every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the pleading of the defendant, shall be taken to be

admitted except as against a person under disability, provided that the Court may in its discretion require any fact so admitted to be proved otherwise than by such admission. Sub-rule (2) thereof provides that where the defendant has not filed a pleading, it shall be lawful for the Court to pronounce judgment on the basis of the facts contained in the plaint, except as against a person under a disability, but the Court may, in its discretion, require any such fact to be proved. Sub-rule (3) provides that in exercising its discretion under the proviso to sub-rule (1) or under sub-rule (2), the Court shall have due regard to the fact whether the defendant could have, or has, engaged a pleader. Sub-rule (4) provides that whenever a judgment is pronounced under this rule, a decree shall be drawn up in accordance with such judgment and such decree shall bear the date on which the judgment was pronounced.

7. The Rule 10 of Order 8 of the Code of Civil Procedure provides that where any party from whom a written statement is required under rule 1 or rule 9 fails to present the same within the time permitted or fixed by the Court, as the case may be, the Court shall pronounce judgment against him, or make such order in relation to the suit as it thinks fit and on

the pronouncement of such judgment a decree shall be drawn up.

8. Plain reading of Rule 5 as well as 10 of Order 8 would disclose that in case the defendant fails to file written statement, the Court is empowered to dispose of the suit by pronouncing a judgment. Rule 5 specifically says that such pronouncement of a judgment could be on the basis of the facts contained in the plaint. However, in both the cases, there has to be a judgment. The term "judgment" has been defined in Section 2(9) of the Code of Civil Procedure to mean a statement given by the Judge on the ground of a decree or order. The term "order" has been defined under Section 2(14) to mean the formal expression of any decision of a Civil Court which is not a decree, and a decree in terms of Section 2(2) signifies a formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit. Obviously, therefore, the Court while proceeding to pronounce a judgment has to consider the facts stated in the plaint, whether those facts reveal any right in favour of the plaintiff to seek relief claimed for, or whether the law applicable to the

facts disclosed in the plaint would entitle the plaintiff to seek prayers asked for, and on consideration of the facts disclosed in the plaint and applying the law relevant to the matter, the Court can proceed to pronounce the judgment and only on pronouncement of such judgment, a decree can be drawn up.

9. In the case in hand, the Court on 21st March, 1997 proceeded to dispose of the suit with the following order:-

> "Mr.A.R.Shivji i/b M/s.Kantawala & Co., for the Plaintiffs. Ms.Preeti Shah i/b M/s.Mulla & Mulla & Craigie Blunt & Caroe, for defendant no.1. Defendant No.1 has already filed written statement and directions have been already given. Defendant Nos.2 and 3 absent though served. Ms.S.G.Shah for defendant Nos.2 & 3 absent.
>
> Today, Mr.Shivji, appearing for the plaintiffs tenders original documents as per list, which are taken on record and are marked Exhibit 'A' collectively.

> Heard Mr.Shivji for the Plaintiffs. Perused the proceedings and the original documents, and accordingly, following order is passed:
>
> Decree against defendant Nos.2 and 3 only, in terms of prayer clauses (a) and (d) of para 30 of the Plaint.
>
> Suit accordingly is, thus, partly disposed of and will proceed only against defendant No.1, with respect to whom directions are already given.
>
> Certified copy expedited."

10. Plain reading of the above order would disclose that by no stretch of imagination it can be said to be a judgment within the meaning of the said expression under Order 8 Rule 5 or Rule 10 read with Section 2(9) of the Code of Civil Procedure. Besides, the same nowhere refers to the facts in the plaint. On the contrary, the suit appears to have been decreed in terms of prayer clauses (a) and (d) solely on the perusal of the proceedings and the original documents. Rule 5 specifically refers to the facts stated in the plaint and does not refer to the documents sought to

be produced by the party. In the case in hand, the plaintiffs were allowed to place the documents on record and on perusal of such documents, the suit was decreed. Such an exercise is not permissible either under Rule 5 or Rule 10 of Order 8 of the Code of Civil Procedure. At no stage of the proceedings, the Learned Single Judge directed the suit to proceed ex parte. At no stage of the proceedings, the plaintiff was directed to lead the evidence in support of his claim in the plaint, nor the documentary evidence was taken on record in the manner known to law and as prescribed under the provisions of law. Being so, it was not open for the Court to allow the plaintiffs to place the documents on record for consideration thereof. Apparently, therefore, the impugned order disposing the suit by no stretch of imagination can be said to be either under Rule 5 or Rule 10 of Order 8 of the Code of Civil Procedure.

11. Disposal of a suit, either under Rule 5 or Rule 10 of Order 8, has essentially to be based on the facts disclosed in the plaint. The impugned order nowhere discloses consideration of the facts stated in the plaint. It nowhere discloses the consideration of law which could entitle the plaintiff to seek relief in the form of prayer clauses (a) and (d) on the basis

of the facts stated in the plaint or even on the documents which are stated to have been produced by the plaintiffs. Apparently the impugned order has been passed mechanically without application of mind.

12. The rule 1 of the Order 9 of the Code of Civil Procedure provides that on the day fixed in the summons for the defendant to appear and answer, the parties shall be in attendance at the Court-house in person or by their respective pleaders, and the suit shall then be heard unless the hearing is adjourned to a future day fixed by the Court. The Rule 6(1)(a) of Order 9 of the Code of Civil Procedure provides that where the plaintiff appears and the defendant does not appear when the suit is called on for hearing, then if it is proved that the summons was duly served, the Court may make an order that the suit be heard ex parte. Perusal of these provisions of law would disclose that the Court apart from passing a decree on the basis of the facts stated in the plaint on account of failure on the part of the defendant to file written statement, can proceed to hear the suit in terms of the provisions of Order 9, and more particularly in terms of Rules 1 and 6(1)(a) thereof. However, if the Court decides to hear the suit for final disposal on account of failure by the defendant

to file written statement and to appear before the Court on the day fixed for the same, the Court, before proceeding to hear the suit, should direct the suit to proceed ex parte, and then proceed to hear the suit either on the same day or on any further day fixed by the Court. But when the matter is heard, the Court is bound to follow the regular procedure prescribed by the Code for hearing of the matter. In such case, obviously the provisions of Order 18 will have to be complied with and the provision of Order 13 will have to be borne in mind while documentary evidence is sought to be produced on record. There could not be any reference to documentary evidence unless the relevant provisions of law regarding recording of evidence in respect of documents are complied with.

13. Perusal of the plaint in the case in hand discloses that it was essentially a claim for damages for the alleged wrongful disposal of the goods of the plaintiffs by the defendant No.1. The facts narrated in the plaint disclose that the action was sought to be taken by the plaintiff on account of the defendant No.2 had failed to clear the goods within the time specified. The action was taken under Sections 61 and 62 of the Major Port Trusts Act, 1963. The authority which had to take the said action and who had actually

taken the decision was the defendant No.1.

14. Paragraph 27 of the plaint specifically states that "the said goods were wrongly disposed of by the 1st Defendant in Bombay". Earlier thereto, the paragraph 18 of the plaint reads thus:-

> "The 1st Defendant ought not to have auctioned the goods. The said action of the Ist Defendant was not in good faith, it was unlawful and also not bonafide and was in breach of their statutory duties under the provisions of the Major Port Trusts Act, 1963 and/or the Regulations of the Ist Defendant. The Ist Defendant, therefore, is not entitled to invoke the Provision of Section 120 of the Major Port Trusts Act, 1963. In any event, the Plaintiff has given notice of the proposed suit more particularly set out in Exhibit 'N' hereto. The Plaintiff further says and submits that it was the duty of the Ist Defendant to deliver the said goods to the Plaintiffs and having wrongfully disposed of the said goods, 1st Defendant committed breach of its statutory duty."

15. As regards the appellants are concerned, the sole allegation in the plaint is that it was necessary for the 2nd defendant to inform the 1st defendant about the clearance or otherwise of the goods which were imported by the importers in this country and it was the duty of the 1st defendant to act upon such information accordingly. The plaint, however, nowhere discloses any duty having been cast in that regard under any statutory provision or agreement between the parties which could entitle the plaintiff to claim compensation in respect of disposal of the said goods by the original defendant No.1/ the respondent No.2 herein against the appellants herein. Apart from the bare averment that the cause of action arises in Mumbai, nothing has been pleaded to disclose any right to claim the compensation from the appellants. In any case, no cause of action can be said to have been disclosed in the plaint independently against each of the defendants. In fact, the plaint nowhere discloses any cause of action having arisen independently against the appellants. The entire allegations relate to sale of goods by the respondent No.2. In these circumstances, therefore, there was no occasion for the Learned Single Judge to dispose of the suit only against the appellants.

16. While exercising the powers either under Rule 5 or Rule 10 of Order 8 of the Code of Civil Procedure, or even under Order 9 thereof against some of the defendants, it is absolutely necessary for the Court to ascertain whether there is an independent cause of action disclosed against such defendants. When the cause of action is stated to be joint and several, the court has to ascertain from the pleadings whether such cause of action in relation to the defendants, against whom the ex parte decree is sought to be issued, can be said to have arisen independently or not. The impugned order nowhere discloses any such exercise having been done by the Learned Single Judge while disposing the suit.

17. Perusal of the order while disposing the notice of motion which was taken out by the appellants discloses mere reference to the provisions of Order 8 Rule 5 and the analysis of those provisions. No efforts were made to ascertain whether those provisions are attracted in the facts of the case or not. The impugned order nowhere discloses any exercise being done by the Learned Single Judge in that regard. Merely on assumption that the decree in question has been passed under Order 8, the Learned Single Judge has proceeded to hold that the same can

be interfered only in the appeal. Undoubtedly, the impugned order could have been interfered with in the exercise of power under Order 9 Rule 13 of the Code of Civil Procedure in view of the fact that the impugned order nowhere discloses that it was in exercise of power under Order 8 of the Code of Civil Procedure.

18. Once the order decreeing the suit is set aside, all the orders passed subsequent thereto and as consequence of the decree in the suit are also liable to be set aside. Consequently, order of attachment of the property of the appellants also cannot be sustained and is liable to be set aside.

19. For the reasons stated above, the appeals and the notice of motion succeed. The impugned orders are hereby set aside. The matter is remanded to the Learned Single Judge to give opportunity to the appellants to file written statement as well as to take out appropriate proceedings, if any, and thereafter to deal with the suit in accordance with the provisions of law.

(R.M.S.KHANDEPARKAR, J)

(DR.D.Y.CHANDRACHUD, J)